

To: hagler.tom@epa.gov[]
Cc: []
Bcc: []
From: CN=Tom Hagler/OU=R9/O=USEPA/C=US
Sent: Wed 10/29/2014 6:11:18 PM
Subject: Fw: BDCP and 404

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----- Forwarded by Tom Hagler/R9/USEPA/US on 10/29/2014 11:10 AM -----

From: Tom Hagler/R9/USEPA/US
To: "Nawi, David" <David_Nawi@ios.doi.gov>,
Cc: Karen Schwinn/R9/USEPA/US@EPA, Erin Foresman/R9/USEPA/US@EPA
Date: 07/06/2012 10:32 AM
Subject: BDCP and 404

ATTORNEY COMMUNICATIONS/PRIVILEGED/DO NOT RELEASE

I have two different issues for your consideration:

(1) The 408 Letter of Permission must be finalized before a 404 permit can be issued.

This is relevant to your discussion of schedules. As you know, EPA is not involved in the 408 process; only the 404 process. But the Chief Engineer issued an edict in 2008 that says clearly "The District will draft the [404 permit ROD], but it will not be signed until the Corps has completed its 408 analysis and the Chief of Engineer's (sic) has issued 408 approval." (Emphasis in the original.)(Memorandum from Director of Civil Works, 11/17/08, transmitting memorandum dated 11/12/08).

So I think the critical path to getting a 404 permit is the 408 process, given that it clearly requires serious site-specific design work (65% completion, I believe) that is nowhere on the near-horizon. And 408 also requires NEPA coverage, per the Chief Engineer's discussion.

I understand that there is some thought to calling this project a "minor, low impact modification" so that it fits under the June 2010 delegation of 408 approval authority to the District Level. But, according to the Corps, that doesn't change the fact that the 408 needs to be done before a 404 permit can be issued.

(2) Conceptual Difference of Opinion on Agency Coordination

We at EPA (and the Corps as well, but I'll let them speak for themselves) are noticing a pronounced difference of opinion between DWR and the Federal lead agencies over how agencies should be coordinating on permitting issues.

The Federal approach, briefly, is early involvement of all relevant agencies so that we can identify and address issues early in the process, rather than waiting for fixing them later.

That doesn't seem to be where DWR is coming from.

You and I have already noted the oddity of DWR's refusal to have the Federal NEPA lead agencies involved in the 404 discussions, even though those discussions are about those same Federal agencies' NEPA documents and, potentially, about future federal agency activities requiring 404 compliance.

Recently, we have also discovered that DWR seems to be desirous of controlling informal Corps interactions with EPA and other parties. I am attaching below a recent email chain wherein DWR complains about the Corps sharing 404 drafts with EPA. I find the email chain both humorous and irritating, but at a minimum it is revealing.

I'm not asking you to do anything about this situation. After all, the 404 (or 408) process is not the main stage for the BDCP. That is, you seem to be fully employed just coming up with a preferred project.

At the same time, though, we are dealing with some mightily mixed messages about whether and how EPA is supposed to engage in this effort.

Let me clarify our understanding of where things stand, and you can correct me if I'm wrong.

Formal 404 elevation processes. If it transpires that EPA has problems with your project, EPA has at least two formal elevation mechanisms: the CWA Section 404(c) veto process and the CWA (404)(q) elevation MOU process between the Corps and EPA. These tend to come towards the end of the permitting process, and do not easily lend themselves to "early identification and resolution of issues." Nevertheless, EPA will of course evaluate the project with an eye towards these formal avenues for elevation.

Informal 404 Engagement: We are inclined to ignore DWR's efforts to control federal regulatory agency communications, and will continue to work with the Corps as closely as possible to make sure that there is a unified federal family on 404 issues. We will also try to keep the federal NEPA lead agencies in the loop as to 404 developments, especially if there appear to be NEPA document implications of the 404 process. That is somewhat difficult given that DWR seems to control the documents, but we'll do what we can.

As I said, I'm not really asking for you to fix anything here. This is mainly an FYI, given that you have formal coordination roles in the federal family. If you want to talk about this some more, you can call me, Karen or Erin.

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----- Forwarded by Tom Hagler/R9/USEPA/US on 07/06/2012 10:23 AM -----

From: "Nepstad, Michael G SPK" <Michael.G.Nepstad@usace.army.mil>
To: Erin Foresman/R9/USEPA/US@EPA, Tom Hagler/R9/USEPA/US@EPA
Date: 07/03/2012 01:07 PM
Subject: FW: A draft of the Preliminary Overall purpose statement for CM1 of BDCP (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

FYI

Michael G. Nepstad
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-----Original Message-----

From: Marc Ebbin [mailto:mebbin@emslp.com]
Sent: Tuesday, July 03, 2012 1:04 PM
To: Nepstad, Michael G SPK
Subject: RE: A draft of the Preliminary Overall purpose statement for CM1 of BDCP (UNCLASSIFIED)

Yep. But let's discuss.

1. Wondering what happened to our comments from yesterday? Thought we could have discussed them first before this went out to a broader audience.
2. I thought we had an understanding that you, me, Cassandra and Mike would work together to get to resolution on this in an informal get together.
3. I thought we had all agreed that we would jointly decide how best to distribute joint products to EPA and others.

Mike - this is very sensitive and I'm concerned about having unnecessary stuff in the admin record. Was hoping we could do this along the lines of what the four of us agreed to do.

Am I off base here?

Let me know if you'd like to discuss by phone.

Thanks
Marc

-----Original Message-----

From: Nepstad, Michael G SPK [mailto:Michael.G.Nepstad@usace.army.mil]
Sent: Tuesday, July 03, 2012 12:57 PM
To: Marc Ebbin; Dale Hoffman Floerke (dalehf@water.ca.gov)
Subject: RE: A draft of the Preliminary Overall purpose statement for CM1 of BDCP (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Hi Marc,

I think you sent this to me by mistake.

Thank you.

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-----Original Message-----

From: Marc Ebbin [mailto:mebbin@emslp.com]
Sent: Tuesday, July 03, 2012 12:47 PM
To: Nepstad, Michael G SPK
Cc: Dale Hoffman Floerke (dalehf@water.ca.gov)
Subject: RE: A draft of the Preliminary Overall purpose statement for CM1 of BDCP (UNCLASSIFIED)

Really frustrating.
what happened to our proposed changes?
Who gave him the authority to share with the other agencies - that is not our agreed-upon approach.

-----Original Message-----

From: Nepstad, Michael G SPK [mailto:Michael.G.Nepstad@usace.army.mil]
Sent: Tuesday, July 03, 2012 12:44 PM
To: Enos, Cassandra; Marc Ebbin
Cc: Erin Foresman; Tom Hagler; 'Beggs, Barbara'; Idlof, Patricia S (Patti); michael.tucker@noaa.gov
Subject: A draft of the Preliminary Overall purpose statement for CM1 of BDCP (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Hi Cassandra and Mark,

As we've discussed, DWR sees as the next step a preliminary Overall purpose statement for the construction of new intakes, conveyance, and new project operations (Conservation measure 1) for the purpose of the processing of Corps permits under section 10 RHA/404 CWA. Late in June, we had agreed that we should meet in mid-July to discuss. Unfortunately Michael Jewell is out this week and family things have come up for me and I'll be out on leave and TDY until 1 August.

The Attached preliminary overall purpose statement is a discussion starter that Michael Jewell and I hurriedly came up with between his leave this week and my impending leave in the next three. It should be regarded as a starter statement, not our final draft.

I'd like to suggest that we (you both, me, EPA, and others) all have an email discussion and "reply all" on suggested edits and changes, so that by early August the Corps could set a statement as our official preliminary overall purpose statement for CM1.

I've cc'd EPA to help speed things up. I've also CC'd the lead Fed agencies as a courtesy notification. If Reclamation, NMFS and/or FWS say they have no comments, let's leave them off further emails of this discussion so we don't clog up their in-boxes.

I will be checking my email/replying intermittently while on leave. If we get to a place where the process is done before I get back I'll work with Michael Jewell to get a statement finalized sooner.

Thanks

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